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Supreme Court, U.S.
FILED
DEC 22 1994
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No. 94-1100

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYNETTE ROGERS, *pro se*
Petitioner.

In Re ROGERS

PETITION FOR
EXTRAORDINARY WRIT

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT

LYNETTE ROGERS, *pro se*
624 Cornelia Court
Mountain View, CA 94040
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QUESTIONS PRESENTED

1. Should the writ of mandamus lie to District Court to vacate Judge J.P. Vukasin's orders and judgments which were executed under the following exceptional circumstances: usurpation of power, abuse of discretion, and by a false statement?

2. Did the State of California provide unequal opportunity for registered NURSES RECEIVING FEDERAL grants in a baccalaureate nursing education program at a state university?

3. If a defendant has conspired with officers of the court to impede the due course in the administration of justice, should the court first examine defendants' conduct before ruling on a delay in a long-standing civil rights case?

4. Was petitioner's discharge from federal service justified by the VA's adverse actions?

LIST OF PARTIES

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John D. Chase, M.D.
A.M. Gottlieb, M.D.
Franklin Johnson, M.D.
Richard I. Myers, M.D.
Robert C. Burr, M.D.
Richard T. Cullen
Helen F. Hennessey
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Angelina Frantz
Clara Cutler
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Ms. DuFour

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H-4	Memorandum to Mrs. J. Cramer, Coordinator, from L. Rogers, R.N., June 29, 1973.
H-5	Letter to Dr. A.M. Gottlieb, Hospital Director, from F. Waltjen for petitioner, October 10, 1972.
H-6	Memorandum to L. Rogers, R.N., from J. Cramer, R.N., October 26, 1973
H-7	Memorandum to L. Rogers, R.N., from L. Rogers, October 29, 1974.
H-8	Letter to counsel David C. Weinberg from Franklin Johnson, M.D.
H-9	Affidavit of E. McShan, R.N., filed in U.S.D.C., San Francisco, August 27, 1973

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H-10	Declaration of Lynette Rogers, dated July 11, 1992, with attachments "c" and "d" only.
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I-10	Declaration of Lynette Rogers, July 11, 1992.
I-11	Affidavit of Lynette Rogers, September, 1994.

Petitioner *pro se* herein files this petition for extraordinary writs of error and mandamus to the United States District Court for the Northern District of California (hereinafter USDC) to enter orders or judgment consistent with this Court's findings and opinion after vacating the orders of Judge J.P. Vukasin, Jr., because of exceptional circumstances. Due to the voluminous record, the exhibits to this petition, In Re Rogers, are bound separately and submitted here.

OPINIONS AND JUDGMENTS BELOW

The last filed Judgment in No. 94-16253, on September 27, 1994 is submitted here as reproduced in Appendix A. The previous Judgment in No. 92-16938 is submitted here also as reproduced in Appendix A-2. Both judgments are submitted here since the ORDER of the Ninth Circuit Court of Appeals includes both docket numbers and since this Order bars any motion for clarification of this ORDER. She includes it here as such and reproduced in Appendix A-3. The last judgment, filed on September 27, 1994, was on Order No. 94-16253 filed August 26, 1994 and is reproduced in Appendix A-4. The appeal to the Ninth Circuit Court was on the Order of the Honorable Judge Saundra B. Armstrong filed June 21, 1994 in No. C 73-0739 and is reproduced in Appendix B-1. A subsequent Order in the same case denying Summary Judgment filed June 22, 1994 is reproduced in Appendix B-2. The above judicial actions are the result of the Orders of Judge J.P. Vukasin and are reproduced in Appendix C-1. The ORDER DENYING INTRADISTRICT TRANSFER AND MOTION TO AMEND JUDGMENT, filed October 20, 1992, is reproduced in Appendix C-2. No formal judgment has been entered by the District Court in her three motions: C-73-0739-CFP, C-83-0719-JPV, and C-83-20374 WAI

filed on July 16, 1992 for Relief from Judgment and Order under F.R.C.P. Rule 60(b)(4).

JURISDICTION

The jurisdiction pled in the Federal District Court under 28 U.S.C.A. §§1343, 1331, 28 U.A.C.A. § 1343(a)(1) (2)(3); 42 U.S.C.A. §§ 1981, 1983, 1985(1)(2)(3), 1986, 1988; 5 U.S.C.A. §5596; 38 U.S.C.A. applicable sections of Civil Rights Laws are submitted here in Appendix D-1. The Back Pay Act of 1966 in [D-2], and Correction of Unjustified Personnel Actions in Federal Service [D-3] (inadvertently omitted from Appendix) is attached at end of text for the court's information. California's Constitution Art.1 §1, and California Civil Rights Act, CCC §51 [see D-1(a)]. Appellant submitted her appeal on November 10, 1992 [D-4] after filing a MOTION TO ALTER JUDGMENT UNDER F.R.C.P. RULE 59(e) to entry of order of Judge J.P. Vukasin on September 8, 1992 [see C-1][D-5]. However in the Ninth Circuit Court's CIVIL APPEALS DOCKETING STATEMENT under the ISSUES PROPOSED TO BE RAISED ON APPEAL, petitioner responded that: "The primary issue with respect to the three cases is that the Honorable J.P. Vukasin, Jr., in C-73-0739-JPV, C-83-0719-JPV, C-83-1519-JPV abused his discretion by failing to disqualify himself after plaintiff-appellant questioned, reasonable and factually, his sense of impartiality in which instances of prejudice to plaintiff would not only undermine her confidence, but also the public's, in the judicial process and injustice in civil rights cases." Therefore, petitioner's appeal to the Ninth Circuit focused on Order #3 filed September 8, 1992 by Judge Vukasin which states: "Plaintiff's motion for disqualification of Judge Vukasin is denied." [See C-1].

Therefore, her appeal was interlocutory. This petition is filed within 90 days of the Judgment of the Court of Appeals below Sup.Ct.R. 20 under 28 U.S.C. §1651(a) and 28 U.S.C. §1331.

CONSTITUTIONAL PROVISIONS

1. The Fourteenth Amendment to the United States Constitution which provides for the due process and equal protection clause.

2. The First Amendment to the Constitution prohibiting the free exercise of speech and to petition the government for redress of grievances.

3. The Fourth Amendment to the Constitution protecting the rights of persons against unreasonable searches.

4. The Fifth Amendment to the Constitution protecting the deprivation of life, liberty, or property without due process of law.

5. The Ninth Amendment to the Constitution to protect all other unenumerated rights.

STATEMENT OF THE CASE

Petitioner, LYNETTE ROGERS, *pro se* is a naturalized citizen and a registered nurse licensed by the State of California. She entered Federal Service on April 15, 1968 in the Veterans' Affairs Hospital, Palo Alto, California (hereinafter VAPA). She was discharged, allegedly for cause, on November 8, 1975. She affirms, and her records show by relevant evidence, that her discharge resulted from a denial to be fairly considered for employment in federal Service by state action, under color of law. She has been deprived of rights, privileges and immunities under the Constitution by an invidious class-based discriminatory animus by persons acting under color of law in the Nursing Department of San Jose State

University (hereinafter SJSU), federal agents of VAPA and private parties in Kaiser Hospital, San Francisco, and, by discovery of a new party, a fee-based psychiatrist of Sunnyvale, California. These defendants conspired, with officers of the Court, with intent to deprive her of equal protection, privileges and immunities under the laws. She filed her original action on May 3, 1973, by seeking an injunction against defendants from taking adverse employment action against her under an unconstitutional regulation: The Proficiency Rating System of DM&S (Department of Medicine and Surgery) which had no objective standards on a right to file a grievance. The VA conceded such facts as published in their Program Guide For Nursing Service DM&S, G-5, M-2, Part V, March 1, 1960. To preclude irreparable injury, petitioner filed an affidavit on August 7, 1973, in support of a Preliminary Injunction [E-1]. Petitioner filed her original complaint against these persons in their individual capacities. Defendant Government insisted that the federal defendants be sued in their official capacities as a prerequisite to the filing of an amended complaint by petitioner [E-2] whereupon the prior signed agreement dated May 15, 1973, of defendants' request to be represented by the United States Attorney expanded the conspiracy by infiltrating the judicial process. [E-3]. Defendants intent to discharge her from the service by taking unjustified personnel actions against her originated by their maintaining and concealing two references from her, at both the administrative and judicial levels. Congress, by statute under 5 U.S.C.A. 5596, created a substantive right under this Act from unjustified personnel actions which are taken with impropriety. Therefore, a waiver

of sovereign immunity is implied in the Act. Petitioner, as the record will show, has been denied all access to this information both at the administrative and judicial process. Defendants have never claimed privilege to this information. Therefore, she has been denied due process under the Fourteenth Amendment. She was discharged from Federal Service on November 8, 1975 and she appealed this discharge through the administrative process. A judicial review of her discharge took place on February 11, 1977 and the court upheld the agency's discharge on the basis of a physician's order. No appeal was taken, which petitioner later addresses under exceptional circumstances. Since petitioner sustained personal injuries by a loss of liberty interest and burdened by two badges of infamy she has, by due diligence, pursued all avenues for relief since 1977. She was trying to obtain full-time employment. She filed a claim under the Office of Workers' Compensation Program (OWCP) of the department of Labor (DOL) on May 10, 1974 after the VA placed her in a clerical position and assigned her to a small room for approximately 106 working days, segregated from her peers with nothing to do. She got no treatment nor compensation for her hypertensive crisis and acute anxiety by either the VA or DOL. The Federal Employees Compensation Act (FECA). 28 U.S.C.A. §8101 et seq. Although FECA has no jurisdiction in case of mental distress, loss of employment and discrimination [see Sullivan v. U.S.D.C. Wisc., 428 F.Supp. 79 (1977), she continued to pursue this avenue of relief for the clearance of her records. [E-4]. Her efforts were thwarted because the OWCP in conspiracy with the VA opposed her efforts, and as the record

shows, persons within the OWCP engaged in unlawful overt acts to add further to petitioner's injuries. In 1982-1983, petitioner undertook in-depth research in the Congressional Records on the basis of previous hearsay evidence with respect to the lawful Composition of VA Disciplinary Boards. She discovered relevant evidence that defendants obtained summary judgment in their favor on February 11, 1977, by making a false representation of a matter of fact by positively affirming that the VA Administrator had the authority to change the chairmanship of disciplinary boards, and also, that the regulation had been changed to this effect. This pleading was before a newly appointed Judge, Cecil F. Poole. Petitioner filed an independent action under F.R.C.P., Rule 60(b)(3) in USDC, San Jose (S.J.). The action was filed under Civ. No. C-83-20374 WAI. While a decision was pending in this action before the Honorable William A. Ingram in S.J., a newly appointed judge, John P. Vukasin, Jr., who was presiding over her Privacy act case against DOL which he acquired through a reassignment from a previous experienced judge, allegedly obtained permission from Chief Judge Robert Peckham to have her case transferred from the S.J. venue district to venue of San Francisco under a related case theory in C-83-0719 JPV. Judge Ingram later denied petitioner's claim stating that she needed to show an unconscionable scheme. One year later, petitioner filed her motion, as ordered by Chief Judge Peckham of the Reassignment Committee and submitted it to Judge J.P. Vukasin in C-83-1519-JPV showing an unconscionable scheme. These actions are discussed with particularity in the following section, but are presented here as reference to a chronological period only.

On June 20, 1985, Judge Vukasin denied petitioner's motion for relief claiming it was meritless. In November 1987, petitioner filed a claim in the Claims Court on an alleged breach of oral contract. This contract was conditional in that petitioner specifically informed the VA interviewer, an Assistant Chief Nurse, that she was fired from Kaiser Hospital because of her student experiences in SJSU. This experience resulted from state action, under color of law. The Claims Court held that no such contractual right exists for federal employees and dismissed petitioner's claim. An appeal to the United States Court of Appeals for the Federal District followed. On June 16, 1989, the Court ruled in favor of defendant in an unpublished opinion. She returned to the Claims Court under Rule F.R.C.P. 60(b) because she further discovered on April 15, 1989, that the unsatisfactory Proficiency Report given her by her superior with reasons for her discharge, was not authored by her superior, the alleged rater, who stated otherwise under penalty of perjury in 1973, to the Court. The Claims Court entered judgment on November 16, 1990 in favor of defendant. In 1991, petitioner discovered relevant evidence from the State of California that the physician, on whose order the court sustained her discharge in 1977, was unlicensed to practice in the state. She made this discovery this one week prior to passage of Public Law 102-40 on May 7, 1991, The Department of Veterans Affairs Health Care Personnel Act of 1991, in which the VA, repealed an entire chapter of 38 U.S.C.A., i.e. Chapter 73, and replaced it with Chapter 74 of 38 U.S.C.A. Therefore, in presenting her claim for equitable relief on July 16, 1992 for reinstatement in the VA

under the Administrative Procedure Act (APA), she amended her pleadings under a relation back theory to her original action she filed under 28 U.S.C.A. §1343, 1331. This amendment is contained in her three motions filed in C-73-0739-CFP, C-83-0719-JPV (both in S.F.), and C-73-20374 WAI in S.J. Judge Vukasin obtained all the motions in his court and denied her relief on September 8, 1992. [See prev. C-1]. After petitioner received the first Order from the Ninth Circuit Appellate Court, she petitioned the next assigned judge, the Honorable Marilyn Hall Patel, under S.Ct.Rule 22 to render judgment on her three motions since she was without clarification by the Ninth Circuit's Order. [See prev. A-1]. Her case was reassigned to Judge S.B. Armstrong who entered the court's order as stated previously. [See prev. B-1&2]. She again appealed this denial and the court issued its second mandate citing a precedent case whereby an appeal to vacate the mandate is permitted. Petitioner filed a motion in the Appellate Court to vacate the mandate. The court returned her Motion holding that no motions are to be accepted from her. [E-5]. Hence petitioner invokes the ingerent powers of the Supreme Court for the following reasons.

REASONS FOR GRANTING THE WRIT

There are extraordinary reasons that petitioner presents to this Court for granting extraordinary writs.

1) The Ninth Circuit Court's mandate violates petitioner's right to due process of law, and freedom to exercise her rights to free speech by denying her these rights to seek clarification of its mandates. The Ninth Circuit's original mandate [A-1] was also upheld by its second mandate which

recites the same prohibitions. [A-2]. This bar to clarification is contrary to this Court's precedent case of In Re Potts, 17 S.Ct. 520 (166 U.S. 263). Here the court held, that even though the circuit court is bound by the decree: "That the circuit court may consider and decide any matters left open by the mandate of this court, and its decision of such matters can be reviewed by a new appeal only." In petitioner's case, the appellate court refused to review any matters left open by its mandate. However, the Ninth Circuit has placed an absolute bar as to inquiry of its mandate. Therefore, she is denied due process. Furthermore, this court has held that: "If the circuit court mistakes or misconstrues the decrees of this court, and does not give full effect to the mandate, its actions may be controlled either upon a new appeal, if involving a sufficient amount, or by a writ of mandamus to execute the mandate of this court." Petitioner therefore alleges that the circuit court did not give full effect to the mandate, and therefore, the Supreme Court may review the order of the USDC by a writ of certiorari under 28 U.S.C.A § 1254 and examine the record for "writ of mandamus." In United States Alkali Export Ass'n v. United States, 65 S.Ct. 1120, 1124 1934 (1945) this court has the authority to review judgments and orders of the district court by writs of certiorari and mandamus. Jud. Code §262, 28 U.S.C. §377. And in DeBeers Consol. Mines v. United States, 65 S.Ct. 1130, this Court, by its appellate jurisdiction, can review situations where Congress has neither legislated by statute nor provided for review of interlocutory orders. The All Writs Act of 1948 consolidates these prior provisions for review in 28 U.S.C.A. §1661(a). The orders in question are those of Judge Vukasin which

are interlocutory as discussed below. Therefore, the Court will find, on review of these orders, that Petitioner's invocation is proper for a remedy of mandamus because of the extraordinary circumstances in her case. See Bankers Life & Casualty Co., 74 S.Ct. 145, 149 (1953), quoting ex parte Fahey, (1947), 67 S.Ct 1558, 1559, in which the court held: "As extraordinary remedies, they are reserved for really extraordinary causes." Petitioner's conduct has been consistent with her beliefs and actions and compatible with the citizens of the State of California's concerns for the delivery of safe and responsible health care, and for the public's belief in the trustworthiness of its institutions. She believed, and was assured by positive verbal and written assertions, that she would have support for providing changes in the delivery of health care to veterans by the VA. She was therefore meeting the terms of the Nurse Traineeship Program and as a former recipient of federal funds. [Z (attach.30,31)]. In order to maintain this stead-fastness of purpose, and be given equal protection, privileges and immunities under the law, petitioner has diligently pursued her rights since 1973 through the judicial and administrative process. She has no other means to obtain the relief she desires. See Roche v. Evaporated Milk Ass'n, 63 S.Ct., 938,941 (1943).

2. The second reason for invoking the writ is that the Ninth Circuit Court, by affirming the Orders of the District Court, leaves unaddressed the Orders of Judge Vukasin without an entry of judgment. Therefore, she invokes the supervisory powers of this Court to determine, by the following exceptional circumstances, that the warrant of a writ to the District Court with respect to the Orders of Judge Vukasin is justified

since they were effected by manifest injustice over a protracted period of ten years.

The Supreme Court has the power to review and vacate these orders under 28 U.S.C.A. §2106. Therefore, she presents three exceptional reasons which qualify for review. Judge Vukasin's Orders, [see C-1 & 2] result from three motions which were filed on July 16, 1992. Only Motion No. 2, C-83-20374 WAI is submitted here in the Addendum in its entirety and designated with applicable exhibits under the letter "Z". The three reasons Petitioner cites are as follows: 1) abuse of discretion, 2) usurpation of power, and 3) making a false statement in his Order. Petitioner also presents two previous Motions by which she requested a change of venue from the district of San Francisco, to San Jose, to prevent manifest injustice, but Judge Vukasin denied every petition. [E-6; E-7]. By these denials and proof of the exceptional circumstances following, it can be inferred that Judge Vukasin's intent was to continue to inflict manifest injustice upon Petitioner. When Petitioner first filed her civil rights jurisdiction claim, she did so under general venue requirements which is permissible under 28 U.S.C.A. §§ 1343, 1331. See Buhl v. Jeffies, 435 F. Supp. 1149, 1150 (1977). In her final request by MOTION TO ALTER JUDGMENT UNDER F.R.C.P. Rule 59(e) filed September 11, 1992, she again petitions the Court to transfer her case to the San Jose district in the interests of justice under Local Rule 205-4. [See D-5]. This was also denied by Judge Vukasin in his Order on October 20, 1992. [See C-2]. Petitioner therefore presents the following facts which qualify as exceptional reasons to vacate the orders and judgements of Judge Vukasin.

ABUSE OF DISCRETION

1. Judge Vukasin abused his discretion by failing to recuse himself when Petitioner raised the question of his impartiality in a Motion filed July 16, 1992, calling for his disqualification. [E-8]. Mandamus does lie when this discretion is abused. See Los Angeles Brush Mfg. Corporation v. James, 47 S.Ct., 286, 288 (1927). And in SCA Services Inc. v. Morgan, 557 F. 2d, 110 (7th Cir. 1977) the Court identified a specific instance that qualifies as an abuse of discretion which is a failure of respondent to recuse himself. Because of the mandatory nature of the statute, a failure to recuse warrants mandamus relief. In Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194, 2195 (1988), the Court stated that the judge's refusal to recuse himself invites a risk of injustice to Petitioner and undermines the confidence of the public in the judicial process. 28 U.S.C. §§455(a) calls for disqualification in any proceeding where the impartiality of the judge may be reasonable questioned. Judge Vukasin refused to disqualify himself. [See C-2 of Order filed September 8, 1992]. A copy of the TABLE OF CONTENTS to the Ninth Circuit Appellate Court [E-9] asking for his disqualification was the only order of denial among the six listed which Petitioner appealed relief from [see prev. C-2] on March 15, 1993. Therefore, her appeal was on an interlocutory Order.

USURPATION OF POWER

2. In another exceptional reason showing circumstances that justifies the extraordinary remedy of mandamus is when Judge Vukasin obtained her case against the Veterans Administration (VA) by a usurpation

of power. See Will v. United States, 88 S.Ct. 269 (1967). This usurpation of power occurred when Judge Vukasin granted defendants' Motion for Summary Judgment in C-83-0719 JPV. Petitioner was claiming relief under the Privacy Act of 1974. On January 17, 1984, Judge Vukasin granted defendants' motion for summary judgment [see E-8, attach. 4] and Petitioners case was again promptly dismissed. In order to bring her case against the VA in C-83-20374 WAI before Judge Vukasin as a related case to C-83-0719-JPV, defendants obtained a Related Case Order which was signed on March 26, 1984 by Judge Vukasin. [E-8, attach. 2]. The Chief Judge, R. Peckham, signed the order for the Reassignment Committee on March 27, 1984. [E-8, attach 3] However between January 17, 1984, when Judge Vukasin granted defendants summary judgment in C-84-0719, and March 27, 1984, the date he signed the Reassignment Order, Judge Vukasin had no jurisdiction over petitioner as a party because of his earlier dismissal of her case (69) days previously. Judge Vukasin failed to abide by the Local Rules of the Court; specifically, L.R. 202-2(c) by denying her due process to be heard when she filed a counterstatement opposing notice of related case on March 14, 1984. Under para(c) the last statement says: "The court will then determine whether reassignment should be made." Judge Vukasin took no notice of petitioner's pleadings opposing the reassignment of her case and she was never given the opportunity to be heard. In her Motion for Disqualification of Assigned Judge, the Honorable John P. Vukasin, Jr., under 28 U.S.C. § 144 and Local Rule 205-3 Chief Judge R. Peckham allegedly signed the Order to reassign her case even though she filed her opposition. [E-8]. Therefore, his Order dated October October 20, 1992 in

which he states that plaintiff failed to avail herself of the opportunity to be heard is not only inappropriate since the docket sheet in C 83-0719 JPV shows that petitioner filed a motion for intradistrict change of venue [E-10, see entry Nov. 8, 83, NR 18] in which she requested a Hearing, but nine months later, on August 25 [see NR 18], Judge Vukasin declared petitioner's request for a change of venue moot. This statement is now also false with respect to his final order dated October 20, 1982 [see C-2] since petitioner had previously stated in her Motion to Alter Judgment, filed September 18, 1992, that she received Judge Vukasin's order of denial filed October 20, 1992 before receiving notice that her case was reassigned to him adding: "Therefore, plaintiff was denied requesting a hearing on her motion." [See prev. D-5]. In Judge Vukasin's Order filed October 20, 1992, he also states that the transferor court does not retain jurisdiction in any part of the proceeding [see C-2]. But, as the docket sheets show [E-11], Judge W.A. Ingram had no knowledge that petitioner's case was "case-napped" from his venue since, contrary to Chief Judge R. Peckham's Reassignment Order dated March 30, 1984 [see E-8(3)] that all matters presently scheduled for hearing should be vacated and should be renoticed to the reassigned judge. Nevertheless, they continued until April 19, 1984, when Judge Ingram entered Judgment. [E-12]. Moreover, not only was petitioner's case on the calendar in two different venues, S.F. and S.J., but the same case had two different numbers, but shared the same docket sheets. Furthermore, by changing the case number from C-83-20374-WAI to C-84-1519-JPV, Judge Vukasin foreclosed her right to appeal Judge Ingram's Judgment on April 19, 1984.

3. FALSE STATEMENT

Petitioner first presented these inaccuracies in the docket sheets to the Ninth Circuit Court of Appeals and petitioned the court for relief by a Writ of Mandate (sic) under F.R.A.P. 27(c) by an Emergency Motion under Circuit Rule 27.3 [E-13]. The purpose of this petition was for the Appellate Court to compel the lower court to amend its docket sheets since they contained misrepresented facts and omissions. The clerk denied her petition. [see E-13("B")]. Petitioner claimed that an entry on the docket sheet gave a false impression to the appell-ate court that she had a hearing before Judge Vukasin because the entry in the docket sheet states that one was scheduled for 11/12/72. Petitioner did request a hearing by Notice to all parties for November 12, 1992. [E-14].

Judge Vukasin also stated in his Order of September 8, 1992 that petitioner had an opportunity to be heard. [See C-1]. This statement is false for the following reasons:

(1) On November 10, 1992, petitioner filed her first Notice of Appeal (as amended February 5, 1992 to include "the whole thereof"). [See D-4]. Therefore, her previous Notice of Hearing filed Oct. 9, 1992, became moot by Judge Vukasin's Order of Denial filed September 8, 1992. (2) On November 12, 1992, petitioner worked as stated by her temporary nursing agency, Interim Health Care, in a statement dated November 17, 1994. [E-15]. Therefore, it would not be feasible for her to travel, by rail and bus, a distance of approximately 45 miles each way, appear at a Hearing at 10:00a.m. and return home in time to report to work before 3:00p.m.

Therefore, the court should render Judge

J.P. Vukasin's opinions, orders and judgments void not only in this single instance, but also over the past ten (10) years. Petitioner has been denied due process and equal protections secured by the constitution under the laws by his apparent judicial misconduct. The records show that Judge Vukasin violated his oath of office. In Bradley v. Fisher, 13 Wall, 80 S.Ct. 646, 648 (1872), this Court held that:

> Wilful abuse of power, corrupt exercise of office, express malice toward an individual, and working intentional injury to him by means of false entries made by a false entry in the records of a court of general jurisdiction, are not judicial acts and are not within the iscretion of the judge, and satisfactory proof of their facts is admissable as evidence to usurp the wrong done by such acts, to show that in a particular case, the judge attempted to create for himself a jurisdiction not given by law.

FRAUD ON THE COURT.

In Greater Boston Television Corporation v. F.C.C., 463 F.2d 268, 278 (1971) the court held that:

> The spirit of "fraud on the court" rule is applicable whenever the integrity of the judicial process or functioning has been undercut - certainly in any instance of misconduct by a party.

Defendant obtained Summary Affirmance by a continuing pattern of misrepresentation since the inception of her case. However, the final overt act, a continuing conspiracy with VA defendants is manifested in Appellees' Motion for Summary Affirmance dated August 25, 1993 by counsel Beth McGarry, Assistant United States Attorney. In her discussion, Ms. McGarry states that:

1. Rogers' Motion To Recuse The Honorable John P. Vukasin, Jr., Pursuant to 28 U.S.C.§§ 144 and 145, was Wholly Without Merit. McGarry had knowledge of the falsity of Judge Vukasin's representations since, as the attorney of record on behalf of the government, she knew that petitioner was not given a hearing before Judge Vukasin as alleged in his Order filed September 8, 1992. Petitioner submits defendent McGarry's Motion for Summary Affirmance by which petitioner will establish that this protracted litigation is the direct result of the government's misconduct in the judicial process. Therefore, McGarry obtained judgment in the government's favor once again by a series of misrepresentation of material facts. [E-16].

EXCEPTIONAL CIRCUMSTANCES THAT PREVENTED APPELLANT FROM APPEALING THE DECISION OF JUDGE CECIL POOLE ON JANUARY 16, 1977.

Defendant made a false representation to the court. This issue is factually supported in Appendix F.

First: Defendants fraudulently concealed her discharge papers from her and retired them to the National Personnel Record Center, GSA, St Louis, MO.

The significance of defendants actions left petitioner without any information as to her rights under VA regulatory laws. She first made an inquiry about obtaining information on her retirement deductions on May 11, 1978. [F-1]. Petitioner was informed by the VA that her records were retired. [F-2]. Therefore, three years had passed and the VA withheld this information from her. She also requested her personnel records from the U.S. Civil Service Commission on February 8, 1979. [F-3]. Because of the delay, petitioner retained counsel on

May 9, 1979 to preclude any further delay. [F-4]. A prompt response from the Office of Personnel Management, resulted on May 22, 1979. [F-5]. On VA form 2315-101, Employee Service Station, Rogers discovered that her signature was missing. Also, she was only entitled to a refund of her contributions toward the retirement plan. No remarks were entered concerning the entries. [F-6]. Petitioner discovered the reasons for curtailment of this disbursement was that she was not entitled to either the government's contributions nor to a modest annuity because these records designated that she was charged with "misconduct". She was never informed of the charge of "misconduct." Therefore, she has been denied due process to refute this charge. [F-7]. This form cites that: " S.F. 2815 completed and copy provided employee. 11-6-75." This statement is also false.

Second: VA regulations. VA regulations did not provide for an appeal. Under DM&S regulations, MP-5, Part II, Chapter 8, DISCIPLINARY ACTIONS, GRIEVANCES AND HEARINGS, SECTION A, stated as follows:

> 8a.16 Appeals
> Disciplingary actions by the Administrator under provisions of this section are not subject to appeal since his decision is final."

Third: Defendants obtained judgment on February 16, 1977, in C-73-0739 CFP, by fraud.

> Under under 6.08 REVIEW OF PROFESSIONAL COMPETENCY it states in para:
> "a. General. When any question arises concerning the professional competency of a full-time physician, dentist, or nurse anesthetist who has satisfactorily

completed a 3-year probationary period, consideration will be given to a review by an appropriate Professional Standards Board."

Petitioner, at the time of her administrative hearing, was for all intents and purposes, considered to be in her seventh year of service.

The question of professional competency arose on January 10, 1973, by which Dr. Ernst Burian sent a Memorandum to the Chief, Nursing Service, Helen F. Hennessy, R.N., concerning the nursing care of a veteran. Here he states in para:

"3. Both of these incidents show incompetence, poor judgment and assumption of responsibilities for the physician in charge." [G-1].

Under VA regulations 6.08 REVIEW OF PROFESSIONAL COMPETENCY it states in E(3) that:

"(3) The membership of the Professional Standards Board will be outlined in MP-5, Part II, Chapter 2, paragraph 4,5.

This regulation is provided in the submitted Motion No. 2, Z. [Z-9 (attach. h)] which defines the membership of Professional Standards Board as being composed of:

"(g) solely of nurses to deal with nurses."

The misrepresentation made by defendant to the Court in the February 11 Hearing before Judge Poole is shown by Donna S. Humes, RN, herself, who designates her role as Chairman of the Disciplinary Board [see Z-9 (attach. e)]

Furthermore, in the letter of Proposed Discharge dated February 6, 1975 from Paul O. Battisti, Region 7, he also refers to the Board as a disciplinary board. [See G-2, para 4]. The validity of the composition of the disciplinary board became an issue of conflict when counsel for petitioner raised

the issue in pleadings filed during this period. Petitioner's position was also that:

B. The VA Administrator has no authority to make laws.

The records submitted here speak for themselves. In defendants Motion for Summary Judgment dated January 28, 1977, he states [see I-3, Section III] that the disciplinary board was properly convened because "the rule that a physician must sit on nurses' disciplinary boards was changed on May 8, 1974 to provide for peer review." He further adds that "the Administrator approved the change on May 8, 1974" [G-3, Section III], so that the Chief Medical Director, John D. Chase, M.D., selected the chairman of DM&S Central Office Boards as defendant states in his Motion for Summary Judgment, January 28, 1977 [see I-3, Section III] by Memorandum dated May 3, 1974 [see Z-9 (attach. "b")]. Petitioner's affidavit, dated September 9, 1994, shows that she had no prior knowledge of this false representation, and she justifiably relied on this misrepresentation. [G-4].

She later learned, by her research in The Congressional Quarterly, Weekly Report, dated April 27, 1974, that Mr. Johnson, the Administrator was forced to resign and submitted his resignation on May 3, 1974 which made this Memorandum [Z-9, attach "b"] ineffective. The Administrator's impending resignation was also reported in the New York Times on April 22, 1974. Furthermore, the Federal Times, on April 17, 1974 also confirmed Mr. Johnson's problems as seen here calling for his ouster. [G-5]. Therefore, it is implausible that Mr. Johnson had his mind on the composition of disciplinary boards.

In the fall of 1982, petitioner did in-

depth research after receiving hearsay evidence that a bill was introduced, S 2908, by the 94th Congress, 2nd Session, Calendar No. 1140, September 3, 1976, to pass new legislation that would require a nurse to chair disciplinary boards. This provision did not pass in the bill, and between 1979-1982 petitioner was unable to obtain effective counsel until 1982. [G-6]. She submitted a new independent action under Rule 60(b)(3) and filed same in November 1983 in USDC, San Jose, in Civ. No. C 83-20374 WAI. Defendants now introduced a declaration by Paul Dugan dated February 13, 1984, in which he controverts defendants' earlier position that the regulations had been changed in MP-5, Part II, Chap. 8, Section C. [G-7].

On April 19, 1984, Judge Ingram issued his ORDER (see D-2) denying petitioner relief. His Judgment in C 83-20374 WAI was also rendered the same day. [See C-3]. One of the requirements for relief cited by Judge Ingram was to show an unconscionable scheme. Therefore, petitioner filed a new action in C 83-1519-JPV as directed by the Court's previous orders for new filings. Petitioner submitted a detailed analysis showing why the Administrator had no unilateral authority to change the law with respect to the composition of disciplinary boards as shown in the TABLE OF CONTENTS filed April 17, 1985. [G-8]. She also introduced defendants' unconscionable scheme showing civil rights violations as stated in this TABLE. Judge J.P. Vukasin, as shown in her MOTION FOR DISQUALIFICATION of him returned this extended brief after it was filed in Court. [See prev. E-8]. Judge Vukasin denied petitioner's motion by asserting it was "meritless". Judge Vukasin imposed sanctions on her counsel as specified at the Hearing on June 20, 1985. [See

E-8]. He affirmatively reinforced this penalty on his JUDGMENT filed on July 10, 1985. Under 38 U.S.C. §4110, the law states that the Administrator will appoint the Chairman of Disciplinary Boards. [G-9]. Therefore, petitioner invokes this Court to deny affirmance to this Judgment in C-73-0739-CFP because of defendants' fraud in the lower and appellate court (9th Cir.). "There is firmly established in the law the doctrine confirming the power of the court To set aside at any time any mandate that was procured by effecting a fraud on the court." Greater Boston Television Corporation v. F.C.C., at p. 270 quoting Cord v. Smith, 370 F.2d 418, 423 (9th Cir. 1960).

REASONS FOR SEEKING RELIEF IN 1992

In American Science of Engineering, Inc. v. California, 571 F.2d 58 (1978) it states:

> Jurisdiction under the civil rights statute only comes into play where a cause of action exists. 28 U.S.C. §1343.

Petitioner filed her original civil rights suit on May 3, 1973 under §1343. On July 16, 1992, petitioner submitted three motions for relief in U.S.D.C. by discovery of new evidence showing that Dr. Ernst Burian, on whose order the court sustained her discharge, was unlicensed to practice by state and federal laws. [See Z, 27-"b" of Motion No. 2 submitted here in its entirety.] She addressed this issue in detail in C-73-0739-JPV in Motion No. 1. In her Motion No. 2 in C-83-20374 WAI, she respectfully petitions the Court to review the whole record since it contains ancillary jurisdiction and addresses a common nucleus of operative fact between all defendants under color of law by state action. It is because of state action, under color of law, petitioner has been denied equal protection under the Fourteenth Amendment. In her

Argument in Motion No. 1 she introduced relevant evidence showing that Dr. E. Burian was unlicensed to practice in California. Therefore, Dr. E. Burian was practicing by fraud. See Sublette v. Tinney, 9 Cal. 423 (1858). In her third Motion, C-83-0719-JPV, she establishes a conspiracy, by defendants' overt acts, through concerted action in furtherance thereof. Her TABLE OF CONTENTS in Motions 1 & 3 are submitted here for information. [G-10; G-11]. The transcription of the Hearing before Judge C.F. Poole in C-73-0739 on February 11, 1977 is submitted here. [G-12]. She initially received an admonishment on the charge of allegedly changing a physician's order. After her response [see Z-6] dated July 15, 1973, the charge was reintroduced in the letter of charges. [See G-2]. In 1991, petitioner discovered, by due diligence, that Larry Rouse was also not licensed to practice as a Behavior Modification Psychologist in the State of California and she submitted relevant evidence to that effect. The VA, therefore, for 19 years, fraudulently concealed the unlawful appointments of these two defendants from petitioner and the Court. See Bailey v. Glover, 88 U.S. 22 L.Ed. 636. The state defendants of the Nursing Department, SJSU, deprived her of a right guaranteed by the Fourteenth Amendment, to equal protection under the laws because she exercised her right to free speech under the First Amendment with respect to matters of concern to the citizens of California. These matters concerned the deficiencies in the education program which left students without adequate preparation in theoretical knowledge. Therefore, students were provided with copies of state exams so that they could qualify for post-graduate work in

Nursing. The State of California responded to petitioner's concerns about the deficiencies in her nursing program as well as young students just entering into practice in community institutions. [See Z-38]. Since graduating from SJSU in 1967, practitioner has been the victim of a conspiracy to deny her a liberty interest in her field of nursing. This became apparent after she first sought employment in Kaiser Hospital, San Francisco. In the summer of 1967, as her declaration shows [Z-40 (attach. a through d)], she was terminated from Kaiser on March 8, 1968. She applied for work at the VAPA and was interviewed by Helen Johnson, RN, Asst. Chief. She informed her of her previous termination which resulted, by state action, under color of law, and was assured it would have no effect on her federal employment. After 90 days, she was terminated from the VA, but she appealed this decision as stated in her letter dated 7/2/1968. [Z-43]. Petitioner was labeled a "troublemaker" because she voiced concern for the "therapeutic" nursing techniques used on a paraplegic veteran. This took place, as required for daily discussion, in a ward report. In her letter to Mrs. Miller, she established the conspiracy between state agents and private and federal parties. The VA had a symbiotic relationship with SJSU since their students used the clinical area for their nursing experience. [Z-44]. In 1971, after requesting a transfer from Bldg. 7 to Bldg., she was promoted to a Head Nurse position. She was actively misled by Chief Nurse H. Hennessy, RN, who stated in a memorandum dated January 15, 1971 that: "You may be assured of our contined support and assistance as you assume this position of increased responsibility." Eight months

later, her subordinates, as the record shows, were encouraged by petitioner's superiors to raise a protest. They met for this purpose on the premises of the VA parking lot and at Clara Cutler, RN's apartment, the Lyons Restaurant, and in Barbara Olsen, RN's home for the purpose of constructing a list of 20 charges which, stated initially that they should not be construed as a conspiracy. (Testimony paraphrased from the agency Hearing on April 10, 1974, of Katherine Pestana, RN.) On Friday, March 7, 1972 she was given a memorandum containing seven non-specific reasons for a failure in leadership. [H-1]. She was denied a hearing to respond to the charges, and therefore, denied due process. She was demoted in rank and not permitted to participate in the Leadership classes currently given other head nurses. In furtherance of this conspiracy, defendants took overt acts by the power of collective action in alleged counselings [H-2] and again, in the office of the Chief, Nursing Service. [H-3]. She raised her objections to this meeting and took the Fifth Amendment as stated in her memorandum. [H-4]. DM&S Supplement MP-5, Part II, Chapter 6 states under 6.06(c) that:

> (1) The counseling conference will be informal and confidential and of such a nature as to inform each employee, verbally and in writing, of the manner in which he is perforing or failing to perform his assigned duties.

The overt acts resulted from the VA admitting that they are permitted use information on record from her OPF to meet management's objectives. [Z-17]. Petitioner filed a previous grievance after being informed of disclosure of information in her OPF. [Z-13]. This information was then disseminated

to outside parties [Z-14, 15, 16, 18 & 19]. Petitioner was permitted to view her OPF, but found no adverse material. Instead, she found a laudable report from H. Hennessy, RN. [Z-20]. She was actively misled because the discriminatory conduct continued as shown in her statement to the Hospital Director [H-5]. Further overt acts were taken by withholding her periodic step increases. [H-6]. On October 29, 1974, her step increase was withheld by H. Hennessy, RN, Chief Nurse. [H-7]. Again, on November 8, 1974, by letter to her counsel [H-8]. She received an unsatisfactory Proficiency Report from her Head Nurse E. McShan on August 3, 1973 under penalty of perjury. [H-9]. On the basis of this alleged unsatisfactory report, petitioner was removed from the clinical area and segregated from her peers. She was not permitted to return to the clinical area because of this unsatisfactory report. She was denied due process of law since she was unable to obtain a satisfactory proficiency report because she was illegally detained. On April 15, 1989, E. McShan informed petitioner that she was not the author of this report. See Hazel Atlas v. Hartford Co., 322 U.S. 238 (1944). In 1977, the conspiracy widened and she was ordered to see a medical doctor by Robert P. Duggan [I-1] and on May 23, 1971 she was ordered by Dr. I. Myers to report for a psychiatric examination. [I-2]. No reasons were given, which is a violation of due process. See Stewart v. Pierce, 484 F.2d 1031 (9th Cir. 1973). Dr. R. Burr, psychiatrist, labeled her with a diagnosis of "obsessive-compulsive" personality disorder which predated her employment. He stated that petitioner would produce neurotic anxiety in most jobs where she might work. Her pre-employment physical

shows no such personality deviation. [I-3]. In 1971, she had a routine physical exam which also showed no such deviation. [I-4, see 42]. In 1991, petitioner discovered that Dr. R. Burr was employed by the VA as a fee-based consultant. [I-5]. Under 20 CFR, Ch.1 §10.403. DOL had no authority to send petitioner for an examination as her case was disallowed on October 31, 1974, and June 2, 1975. Dr. R. Burr violated petitioners Fourth Amendment rights. Petitioner engaged in extraordinary diligence to discover the two missing references in her OPF. She filed suit in USDC May 3, 1973. The contents of her OPF were the primary issue as stated in a letter from her counsel to Mr. Wax. [I-6]. A grievance hearing was offered by the VA to the court. On June 4, 1973, a status report to the court was made alleging several major deficiencies in the hearing. [I-7]. She still had no access to this information. Petitioner then sought this information from the Nursing department in SJSU in 1979. [Z-11]. She subpoenaed Dr. Burr's records on February 8, 1984 after diligently pursuing same through the OWCP. In response to her subpoena, defendant threatened her with sanctions by letter dated February 15, 1984. [Z-10]. She finally wrote to Dr. R. Burr himself on June 26, 1991. [I-8]. Dr. Burr responded by saying that he felt her records were either stored in a difficult place or had been destroyed. [I-9]. Therefore, she met the standard of establishing an essential element in her case in which the VA has fraudulently concealed. See Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). Also, Verdon v. Consolidated Rail Corp., 828 F.Supp. 1129, 1131 (S.D.N.Y. 1982) where it was held that an action accrues by civil rights laws based on federal laws when a

plaintiff knows or has reason to know the basis of his action. Petitioner knows that these two references were from San Jose State Nursing department faculty and Patricia Leonard, of Kaiser Hospital, San Francisco. Her declaration narrows these references down to the above two sources. [I-10]. Therefore, petitioner has now been burdened with two badges of infamy; "professional misconduct" from the VA and "obsessive-compulsive personality disorder" from Dr. R. Burr. She has been denied the opportunity to refute both charges. Therefore, she has been denied due process of law. Her affidavit dated September 9, 1994 states that she has been the victim of an unconscionable scheme that goes to the loss of fundamental, but basic, rights under the due process clause of the Fourteenth Amendment. [See D-1]. As a result of this misconduct by defendants, her case has been nationally publicized in Rogers v. United States Dept. of Labor, 607 F.Supp. 692 (D.C.Cal 1985), and Rogers v. U.S. 15 C.Ct, 692 (1988). If these cases are used as precedents on other victims also, it will be a manifest injustice just as it is, thus Petitioner invokes the Court's inherent powers to vacate these judgments and orders in C-73-0739-JPV; C-83-0719-JPV; C-84-1519-JPV; and C-83-20374 WAI. She comes to this Court as a last resort. In Norlander v. Schlek, 345 F.Supp. 595 (1972) the Court held that this plaintiff was deprived of due process under the Fourteenth Amendment to be considered fairly for public service because she too had unsatisfactory references concealed from her. In Shelley v. Kramer, 68 S.Ct. 836 (1948), this court held that:

> State action within the Fourteenth Amendment refers to execution of state power in all forms and when the effect of that action is to deny rights subject

> to the protection of the Fourteenth Amendment it is the obligation of the United States Supreme Court to enforce the constitutional demands. U.S.C.A. Constit. Amend. 14.

In Kletschka v. Driver, (CA 2) 411 F.2d. 436 (1969). This court held that disciplinary action by the VA is not committed to agency discretion. Petitioner has alleged that she is the victim of a class-based discriminitory animus. See Turner v. Fouche, 90 S.Ct. 532, 541 (1970). In the hearings on FEDERAL EMPLOYEE'S COMPENSATION BASED ON CORRECTION OF UNJUSTIFIED PERSONNEL ACTIONS before the Eighty-eighth Congress, it was stated under Purpose that this legislation would:

> [To] assure that all classes of Federal Officers and employees can be treated equitably and uniformly with respect to compensation and employment benefits as a consequence of actions taken to correct unjustified or unwarranted personnel actions.

The Hearing Before the Committee on Post Office and Civil Service House of Representatives of the Eighty-Eighth Congress, dealt with Federal Employees' Compensation based on Correction of Unjustified Personnel actions. H.R. 4837 was prospective and HR 4838 was retroactive. Petitioner is seeking reinstatement under the APA and Back Pay Act of 1966 with the provisions stated under 5 U.S.C.A. § 5596. [D-2]. She is also seeking exemplary damages in the sum of $50,000.00 from Dr. Robert C. Burr, since, although he had no physician-client duty to petitioner, he had an ethical duty not to injure her in conspiracty with defendants, in her professional career by imposing a psychiatric stigma upon her which has also foreclosed a liberty interest in her field of nursing. In the case of Gradsky v.

United States, 376 F.2d. 993, 996 (5th Cir.) 1967, this Court acknowledged that: "A party to a conspiracy is liable as a principle for all offenses committed in furtherance of the conspiracy while he is a member of it." Quoting Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1130, 90 L.Ed. 1489. Her affidavit as stated here shows irreparable injury. [I-23]. Dr. Burr based his diagnosis in his report dated September 29, 1977 (p.5) on the following: "Behavior similar to that which caused trouble at the VA can be seen in the record of her performance as a student at San Jose State, in her job at San Francisco Kaiser Hospital, and at El Camino Hospital."

CONCLUSION

Petitioner invokes the inherent power of this Court to issue a writ of mandamus to the lower court and to vacate the mandate of the Ninth Circuit Court of Appeals for the Northern District of California. Also, final judgment in her case and any other relief ordered by the court under 5 U.S.C.A. §5596, and civil rights laws. Petitioner alleges that her claims accrued in 1991 for liability created by statute for personal injuries. Cal.Civ.Code §338(1-4)(West 1982); see Wilson v. Garcia, 105 S.Ct. 1938, 1949 (1985); Smith v. Cramens, 308 F.2d.187, 190 (9th Cir. 1963). Petitioner suffers a legal wrong of discharge on the orders of an unlicensed physician by an unjustified personnel action.

Respectfully submitted,

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FEDERAL EMPLOYEE'S COMPENSATION BASED ON CORRECTION OF UNJUSTIFIED PERSONNEL ACTIONS

HEARING BEFORE THE COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
EIGHTY-EIGHTH CONGRESS
FIRST SESSION ON

H.R. 4837 and H.R. 4838
BILLS TO PROVIDE FOR THE PAYMENT OF CERTAIN AMOUNTS AND RESTORATION OF EMPLOYMENT BENEFITS TO CERTAIN GOVERNMENT OFFICERS AND EMPLOYEES IMPROPERLY DEPRIVED THEREOF, AND FOR OTHER PURPOSES

MAY 10, 1963

A BILL To provide for the payment of certain amounts and restoration of employment benefits to certain Government officers and employees improperly deprived thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act may be cited as the "Back Pay Act of 1963."

SEC. 2. For the purposes of this Act--

(1) "agency" means--

(A) each executive department of the Government of the United States;

(B) each agency or independent establishment in the executive branch of such Government;

(C) each corporation owned or controlled by such Government;

(D) the Administrative Office of the United States Courts;

(E) the Library of Congress;

(F) the General Accounting Office;

(G) the Government Printing Office;

(H) the Botanic Garden; and

(I) the municipal government of the District of Columbia.

SEC. 3. Each civilian officer or employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action taken on or after the date of enactment of this Act, which has resulted in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of such officer or employee--

(1) shall be entitled, upon correction of such personnel action, to receive for the period for which such personnel action was in effect, an amount commensurate with the amount of all or any part of the pay, allowances, or differentials, as applicable, which such officer or employee normally would have earned during such period if such personnel action had not occurred, less any amounts earned by him through other employment during such period; and

(2) for all purposes, shall be held and considered to have rendered service for such agency during such period, except that such officer or employee shall not be credited, by reason of the enactment of this Act, leave in an amount which would cause any amount of leave to his credit to exceed any maximum amount of such leave authorized for such officer or employee by law or regulation.

SEC. 4. The United States Civil Service Commission shall prescribe regulations to carry out the provisions of this Act. Such regulations shall not be applicable with respect to the Tennessee Valley Authority and its officers and employees.

SEC. 5. (a) There are hereby repealed--

(1) section 6(b) of the act of August 24, 1912, as amended (5 U.S.C. 652(b)); and

(2) that part of the third proviso of

the first section of the Act of August 26, 1950 (5 U.S.C. 22-1) which reads: ", and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving during the period of such suspension or termination, as appropriate, and the interim net earnings of such person."

(b) Notwithstanding the repeal of certain provisions of law made by subsection (a) of this section, such provisions of law so repealed shall continue to have full force and effect with respect to unjustified or unwarranted personnel actions taken prior to the date of enactment of this Act.

SECTION ANALYSIS

Most of the situations which could give rise to the retroactive payment of compensation or employment benefits under the provisions of this draft bill are already covered by the backpay provisions of Public Law 623, 80th Congress, Public Law 733, 81st Congress, the powers of the Civil Service Commission under the Veterans' Preference Act, and a number of decisions of the Comptroller General interpreting these authorities. The backpay provisions of this draft bill, however, would be more uniform and in some cases more equitable than those now available. In addition, the coverage of the draft bill is designed to encompass all employees of the executive branch and certain other agencies. Significantly, the draft bill neither requires any agency to review any kind of personnel action, nor defines or restricts the nature of corrective actions themselves. Moreover, the draft bill does not modify the procedural requirements of any formal system of appeals. All the draft bill requires is that where a right of appeal has

been specifically granted by law or regulation, or where management on its own initiative has discovered a personnel action which in all equity should be reviewed, any corrective action as a consequence extended to a Federal officer or employee with respect to adjustment of compensation or employment benefits must be retroactive in its effect, complete in its remedies, and consistent in its application.

Section 1 of this draft bill authorizes the use of a short or popular title in citing this legislation.

Section 2 of the draft bill defines "agency" in sufficiently broad terms to include all parts of the executive Branch, the government of the District of Columbia, and other establishments of the Federal Government which look to the executive branch for personnel management leadership.

Section 3 defines the coverage of the bill as to persons and the terms under which such persons shall be entitled to backpay. All officers and employees of the agencies encompassed by the definition of "agency" in section 2 are covered. This includes persons in both the competitive and excepted services in these agencies.

"Administrative determination," as used in this section, means a decision made by appropriate authority on its own initiative as opposed to a decision which it has been required to make in order to dispose of a formal appeal. The purpose of this provision is to grant agencies the right at their own option to correct injustices which they identify themselves, especially where no avenue of appeal may be open to the individual involved.

"Timely appeal," as used in this section means a request for reconsideration of an official personnel action adversely affecting an employee, which request: (1) is initiated by the employee or his representative; (2) is

properly made to an agency or to the Civil Service Commission under an appeals system or procedure established by law or regulation; (3) is accepted by the authority administering the particular appeals system or procedure involved. This provision of itself creates no new concepts of timeliness. On this point it relies entirely on the practices established in such other laws and regulations dealing with employee appeals as may now exist or later come into being. The purpose of this provision is to prevent employees from pressing stale claims for backpay when they themselves have slept on their rights.

The phrase, "unjustified or unwarranted personnel action," follows the language of Public Law 623, 80th Congress, the primary backpay authority at the time this proposal was drafted. All personnel actions in the administration of the Federal personnel systems are taken under some authority. Each such personnel action should be intended to be a proper exercise of the powers established by the particular law or regulation under which the action is taken. Nevertheless, occasionally errors are made in the exercise of these powers. Personnel actions which are found to reflect such errors may be defective on equitable or procedural grounds or both. The ruling interpretation of the phrase, "unjustified or unwarranted" with reference to adverse actions in the current administration of Public Law 623, 80th Congress, encompasses both equitable and procedural considerations following the decisions of the court of Claims in Stringer v. U.S., 117 C. Ct. 30, and Garcia v. U.S., 123 C. Ct. 722, and of the Comptroller General in 34 C.G. 568.

"Appropriate authority" means that agency, office, or official empowered under applicable law or regulation to correct or direct the correction of the unjustified or

unwarranted action. in some cases this could be the Civil Service Commission as established, for example, in the Veterans' Preference Act. In many instances, such authority would be found at some level of agency management as defined in applicable regulations and delegations of authority thereunder.

The phrase, "applicable law or regulation," refers to the laws and regulations which provide the bases for operations under the Federal personnel systems. The draft bill looks to these laws and regulations which exist now or may later come into effect--

(1) To provide avenues and procedures for the reconsideration of unjustified or unwarranted personnel actions.

(2) To provide the legal basis for taking proper personnel actions and for correcting unjustified or unwarranted ones.

(3) To establish the locus of the authority to correct improper actions.

Section 3(1) establishes an entitlement to back pay in any situation where a personnel action which has terminated or decreased the compensation of a Federal officer or employee is subsequently found unjustified or unwarranted and corrected by appropriate authority. For clarity the four essentials for an entitlement to backpay under this act are set out below:

1. An official personnel action must have been taken which reduced or diminished some part of an individual's usual salary, wages, or other compensation from Federal employment. In other words, in effect, something must have been taken away.

2. The personnel action in question must have been made the subject of review by appropriate authority either because of a timely appeal or because appropriate authority on its own initiative decided to review that action. In other words, the

specific action which precipitated the employee's loss must have been reexamined.

3. The personnel action in question must have been found by appropriate authority to be unjustified or unwarranted.

4. A corrective action consistent with applicable laws or regulations must have been authorized by appropriate authority as a consequence of its decision.

Section 3(1), therefore, establishes for pay purposes the principle that an employee should be made whole following the correction of an unjustified or unwarranted personnel action which reduced his compensation in some way. As would be defined in detail in the regulations, the adjustment in compensation recognized any obvious things in the normal course of events which would have affected the amount of compensation. With respect to reducing that amount, these would include situations, such as: death before final adjudication of an appeal, separation or furlough as a result of reduction in force, transfer to another agency, and imprisonment for crime. With respect to increasing the amount of compensation, the draft bill assures credit for increments such as periodic within-grade increases and general pay raises to which the employee would have been entitled had he not been subject to the unjustified or unwarranted action. Public Law 623, 80th Congress, and Public Law 733, 81st Congress, unfortunately prevent crediting these increments in computing the amount of backpay. On the other hand, both Public Law 623, 80th Congress, and Public Law 733, 81st Congress, are currently interpreted as including in a backpay computation the premium pay which an employee normally would have earned. To preserve this interpretation the phrase "would normally have earned," which appears in Public Law 733, 81st Congress, and which was discussed by the Comptroller General in 34 Comp. Gen. 382, has

been repeated in the draft bill.

Section 3(1), following the historical precedents in this area, provides that the amount of backpay to which an employee would be entitled would be reduced by whatever amount he earned through "other employment" during the period the action was in effect. The term "other employment" is taken from Public Law 623, 80th Congress, in order to assure a continuity of interpretation on this point. Both the Court of Claims and the Comptroller General view "other employment" as encompassing only that employment engaged in to take the place of the employment the employee had prior to the action against him. This interpretation was discussed by the court in Jackson v. U.S., 121 C. Cl. 405, and by the Comptroller General in 32 Comp. Gen. 408. Therefore, if an employee had been separated from his position, this amount would be the difference between what his Government income should have been and what he actually earned in an employment obtained to take the place of his Government job. If he had been demoted, the amount to which he would be entitled would be the difference between what his income should have been in the proper grade and what it actually was at the lower grade.

Section 3(2) by stating, "For all purposes shall be held and considered to have rendered service for such agency during such period,' provides for the complete restoration to the employee of seniority, service credit toward retirement, life insurance, health insurance, and all other benefits of employment which may have been affected by the action. This is consistent with the current administration of these matters following a court of Civil Service Commission restoration order. In addition, leave accumulation, excluded specifically from the backpay provisions of Public Law 623, 80th Congress, would be authorized uniformly by this draft bill

following the precedent of the more recent Public Law 733, 81st Congress. The excepting clause of section 3(2) assures that the usual ceilings on leave accumulation would be observed, as prescribed by the law or regulation covering the particular leave system to which the employee is subject.

Section 4 authorizes the Civil Service Commission to make such regulations as may be necessary to carry out the provisions of this proposal much as the Commission regulates in certain other pay areas, except that the Tennessee Valley Authority is authorized to make its own regulations. Day-to-day application of these regulations to individual cases would be the responsibility of the agencies concerned. The General Accounting Office would resolve specific questions in individual cases as it does other matters involving claims and demands against the Government of the United States.

Section 5 repeals the backpay provisions of Public Law 623, 80th Congress, and Public Law 733, 81st Congress, except as to unjustified or unwarranted personnel actions taken before enactment of this proposed act.

STATEMENT OF PURPOSE AND JUSTIFICATION OF A DRAFT BILL TO PROVIDE FOR THE PAYMENT OF CERTAIN AMOUNTS AND RESTORATION OF EMPLOYMENT BENEFITS TO CERTAIN GOVERNMENT OFFICERS AND EMPLOYEES IMPROPERLY DEPRIVED THEREOF, AND FOR OTHER PURPOSES.

PURPOSE

To assure that all classes of Federal officers and employees can be treated equitably and uniformly with respect to compensation and employment benefits as a consequence of actions taken to correct unjustified or unwarranted personnel actions.

JUSTIFICATION

This legislative proposal consolidates what is generally referred to as "backpay" authority into one logical, equitable, and

comprehensive statement of entitlement with respect to compensation and employment benefits. It is more than a codification of current backpay authorities because these authorities, while adequate in many respects, may not be applied uniformly to all similar situations and do not afford completely consistent remedies. The proposal is not entirely new, however, because it has largely selected the best elements from these familiar authorities, welded them into one principle, and proposed the use of that principle in every instance where a question of backpay can be raised. Briefly this principle holds that an employee is entitled to be made whole whenever an erroneous personnel action which has terminated or reduced his compensation is corrected by appropriate authority. Significantly this proposal is not concerned with the substance of appeal rights, the structure of the appeals process, or the precise nature of the corrective actions.

This proposal could justify itself with principles of fair play or philosophical concepts of equity and justice. Fortunately for purposes of brevity, this is not necessary. It is also unnecessary to recount how the concept of backpay has been widely accepted in industry. The simple fact is that the trend in law, regulation and interpretation demonstrates clearly that the Congress, the courts, the agencies, and the Comptroller General have been thinking along these lines for a long time with particular emphasis on the past 15 years.

Background of current authorities

In 1947 it was pointed out in Congress, according to the legislative history, that a "glaring loophole in the present law" existed if an employee in the competitive service who successfully availed himself of a right of appeal could not always be reimbursed for the compensation he lost while his appeal was

pending. In 1948, after consulting the Civil Service Commission and others, Congress responded to this need by enacting Public Law 623, 80th Congress, as an amendment to the Lloyd-LaFollette Act.

Public Law 623, 80th Congress, authorizes backpay in nonsecurity cases involving improper separations and suspensions of nonveterans with civil service status in the competitive service and all veterans who have completed their trial or probationary period. The amount of pay is computed at the rate the employee was receiving at the time of the improper action and covers the entire period the action was in effect. Leave accumulation covering the same period, however, was excluded from the other remedies to which an employee was entitled under the act.

In 1950, with the passage of Public Law 723, 81st Congress, Congress acted again in the backpay area, this time protecting executive branch employees suspended or terminated in erroneous security actions. The amount of backpay is computed as under Public Law 623, 80th Congress; however, agency heads are authorized to determine whether the employee will be paid for all or part of the period of erroneous suspension or removal. Interestingly, agency practice under this law has been to authorize payment for the entire period almost without exception. More complete as to benefits, Public Law 733, 81st Congress, has been interpreted to permit leave accumulation covering the period of the erroneous action.

The third major source of backpay authority is the Veterans' Preference Act of 1944, as amended. This act has been interpreted as authorizing back pay in cases involving improper demotions of veterans who have completed a trial or probationary period and in cases arising as a result of erroneous reduction-in-force actions whether or not the employees concerned are veterans.

In recent years the trend of Comptroller General's decisions interpreting these authorities has been toward greater flexibility. This trend notwithstanding, however, it is apparent that these authorities, as now stated, provide an inadequate basis for full solution to the backpay problem. If the problem is to be corrected, new legislation must be the answer.

The need for change

Most backpay situations in the Federal Service are already covered in some way by current authorities. This factor itself tends to demonstrate that the principle of backpay as part of corrective action is well established. It suggests further that the reason the backpay picture is not complete today is more a matter of oversight than intentional arrangement. It is apparent that whenever Congress has faced the problem of backpay, it has never intended its action to discriminate against any employee who could build an equitable claim. Circumstances, unfortunately, have led to a piecemeal approach to the back pay problem.

As a consequence, veterans are now afforded broader backpay benefits than nonveterans and at any given moment there are still many veterans and nonveterans alike who could not be awarded backpay at all except in the correction of erroneous reduction-in-force actions. This number would include all employees serving probationary or trial periods, and many nonveterans who are employed by their Government outside the competitive civil service.

Private relief legislation in individual cases cannot answer the problem, because it tends to discriminate against the person who does not seek special consideration beyond the remedies available to all. In the interests of both uniformity and equity, therefore, there is a strong case for

improving the present backpay authorities. The case is particularly strong when it is recognized that the step toward a better backpay authority is a small one in terms of costs and administrative adjustments. No great number of cases should add appreciably to current costs and the handling of all backpay cases would be little different from current procedures.

Impact of the current proposal

There are four features of this legislative proposal which should be kept in mind in order to understand what it is designed to accomplish and, just as important, what it is not designed to do:

1. *The comprehensive nature of this authority.*--The proposal assures that backpay protection would be available to a Federal employee whenever an unjustified or unwarranted personnel action which diminished his pay is corrected in his favor. The proposal does not attempt, however, to specify the precise nature of the corrective actions. It requires only that the unjustified or unwarranted action be corrected before an entitlement is created. It is inherent in the use of the term "correction" that the administrative action referred to must be one which is consistent with applicable laws and regulations. The protection does not hinge on the operation of any particular system of appeals, but would be available as a consequence of the operation of any system of appeals. In addition, where no avenue of appeal is available, an agency itself may award backpay to an employee merely by acknowledging that its action affecting the employee adversely was unjustified or unwarranted and correcting it.

2. *The test of diminished income.*--Many things may happen to the disadvantage of the employee on the job which may have a real or potential effect on his finances--a hoped-for

promotion or job classification upgrading may be denied or delayed, a transfer to a new location may be more expensive than anticipated, a free official parking space may be lost, etc. This proposal does not deal with situations of this sort. The purpose of this proposal is only to permit an agency to make an employee whole from a pay and benefits point of view following its decision to correct an unjustified or unwarranted personnel action against him.

To accomplish its purpose this proposal used the "test of diminished income" which must be applied in every potential backpay situation before an entitlement is established under this authority. The unjustified or unwarranted personnel action, in effect, must have taken away some part of the normal salary, wages, or other compensation of the employee affected. In other words, if no part of the employee's salary, wages, or other compensation as a Government employee was actually diminished by the improper action, there can be no claim to backpay when that action is corrected.

3. *The requirement for timely action.*--In order to preserve his right to backpay, the employee under this proposal would be required to exercise the rights of appeal open to him in a timely manner. For example, an employee whose position was downgraded would lose his right to demand backpay unless he made a timely and successful effort to appeal the downgrading action. Should that employee be promoted sometime later in a routine reallocation of his position, such reallocation would have no back pay implications.

4. *The advantages of agency initiative.*--By permitting an agency to authorize back pay on its own determination in correcting an unjustified or unwarranted personnel action, this authority introduces two new elements of flexibility which strengthen the corrective

powers of management. First, when an agency discovers it has inadvertently taken an unjustified or unwarranted action, it would be free to correct the action immediately on its own initiative with an appropriate pay adjustment. This avoids the loss of time and resources involved in an appeal over a matter which the agency may feel in advance should be settled in the employee's favor. Second, when an agency desires to extend backpay adjustments uniformly to all persons in the same circumstances when an appeal is won by any one of the persons involved, it would be free to do so on its own initiative.

In a recent case, for example, a group of veterans in wage board jobs successfully appealed to the Civil Service Commission their demotions as a result of job classification downgradings and were awarded backpay. A nonveteran worker in the same group, who had no right of appeal to the Commission, benefited by the subsequent reinstatement to grade but was denied the backpay adjustment his associates received, because the agency had no authority to pay him. This proposed authority would have permitted the agency, had it desired, to authorize the same kind of adjustment to all of the employees involved.

Cost estimate

It is very difficult to assess the cost involved in this proposed bill. This is not because these costs would constitute a major expenditure. Instead it is because "added" cost is the information needed while readily available information unfortunately reveals little about current cost. Today agencies generally absorb the costs of compensating employees entitled to backpay. Under the proposed bill, no change in this is envisioned.

Potentially some agencies may have a somewhat larger number of cases involving backpay entitlement than they have at

present. On the other hand with such clear-cut and comprehensive entitlement established, agencies would have an added incentive to conduct their appeal and review activities in a timely and expeditious manner in order to minimize the cost of such entitlements. Moreover, the draft bill would tend to limit the size of retroactive payments because employees who neglect to use their appeal rights, if any, in a timely manner would lose their right to demand backpay.

In the benefits area it would be virtually impossible to "cots" the accumulation of leave covering periods of improper separation or suspension as authorized by the draft bill. Taken at different times, leave has different values. In addition, while terminal lump-sum annual leave payments can represent a cash expense, sick leave should have no actual value unless the employee is ill. It would seem reasonable to assume, therefore, that this legislative proposal would create no new costs or inconveniences in the leave area more burdenscme than those agencies are adjusting to now.

Those benefits to which employees are entitled on a contributory basis, such as retirement, life insurance, and health insurance, would not constitute added costs under the draft bill. The employee would continue to be required to make up his back contributions, along with his taxes, for any period during which they were not withheld. This requirement stems from the fact that where an employee is granted the benefits of the administrative fiction of having "rendered service" he also assumes a responsibility for the obligations which that service would have imposed.

It is about as difficult to estimate the number of new backpay entitlements which would arise under this proposal as it is to assess the value of these entitlements. The

size of the new groups covered in some instances is large. Nevertheless, the potential number of backpay cases likely to arise from these groups, experience tells us, is surprisingly small. For example, the new proposal would give added protection to career nonveterans (there are about 1 million nonveterans in the competitive service). However, in the first 6 months after July 1962, when appeal rights of nonveterans in the competitive service were made the same as those of veterans, the Commission received fewer than 100 appeals, which, if decided in favor of the employee, could have resulted in entitlement to backpay under this proposal. We do not know how many such cases were handled at agency levels under circumstances which would have involved backpay. We assume the number is also small. The number of appeals of nonveterans is expected to increase with time but will still be a small proportion of the total number of nonveterans in the competitive service.

Nonveteran employees in excepted positions for the first time would be entitled to backpay if they lost compensation as a consequence of unjustified or unwarranted suspensions, separations, or demotions for cause. At present, these employees, and there are about 100,000 of them, have no appeal to the Civil Service Commission in such actions, and agencies have considerable flexibility in actions affecting their tenure. Under this proposal, therefore, there would be only as many new backpay entitlement cases involving these employees as procedures under agency control would generate.

This proposal would also cover, for the first time, employees serving probationary or trial periods. At any one time, there are probably between 100,000 and 175,000 such persons throughout the service. The proposal

requires, however, that there can be no entitlement to backpay without a finding that the adverse action involved was unjustified or unwarranted. Compared to persons who have completed their trial period, the appeal rights of probationary employees are very limited. Naturally this would tend to keep down the number of entitlement cases.

Under section 2.301(c)(2) of the Commission's regulations, the Commission considers appeals to termination based on conditions arising prior to the appointment of probationers in the competitive service. In less than 100 cases last year were Commission determinations such than an employee would have been entitled to backpay. A probationary or trial period employee does not have a right to appeal to the Commission.

In conclusion, the Commission is unable to estimate the costs of this proposal precisely without an expensive and detailed study going into the experience of each Federal agency. With the facts which are available, however, it seems safe to estimate that less than $500,000 per year in additional costs would be involved Governmentwide and that most of these costs would be of the type which agencies customarily absorb in the normal course of operations. The proposed legislation will not involve additional expenditures for personnel services to administer its provisions.
